Supreme Court, U.S.
FILED

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No. _____

October Term 2001

IN THE
SUPREME COURT OF THE UNITED STATES

MARIA DEJESUS FAVELA
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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MARIA FAVELA

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QUESTIONS PRESENTED FOR REVIEW

WHETHER A DETENTION OCCURS FOLLOWING AN INTERDICTION AT AN AIRPORT BY NARCOTIC INTERDICTION OFFICERS WHO APPROACH A SUBJECT FROM A DISTANCE OF 1-1/2 TO 2 FEET WHEN THE SUBJECT IS APPROXIMATELY 1-1/2 FEET FROM AN INTERIOR WALL AND WHETHER UNDER THOSE FACTS A REASONABLE PERSON WOULD HAVE FELT FREE TO TERMINATE THE CONTACT AND LEAVE.

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Minnesota v. Dickerson, 508 U.S. 366 (1993),
U.S. v. Mendenhall, 446 U.S. 54 (1980)
Florida v. Royer, 460 U.S. 491 (1983)

OPINIONS BELOW

United States of America v. Maria DeJesus Favela, __ F.3d ____ (8th Cir. 2001), Case No. 00-2314

JURISDICTION

The Opinion affirming the Petitioners conviction was handed down April 26, 2001, by the United States Court of Appeals for the Eighth Circuit.

This Petition for Writ of Certiorari is initially filed in this Court within 90 days of the date following which the Opinion was affirmed in the United States Court of Appeals for the Eighth Circuit. Petitioner invokes the jurisdiction in this Court pursuant to *U.S. Sup. Ct. R. 13.1* and *10(a)* and *28 U.S.C. 1254 (1)*.

CONSTITUTIONAL PROVISIONS

U.S. Constitution Amendment 4

STATUTORY PROVISIONS

21 U.S.C. 841 (a) (1) and (b) (1) (A)

STATEMENT OF THE CASE

That the Defendant was charged in the U.S. District Court for the Western District of Missouri in **Cause No. 99-228-01-CR-W-SOW**, with an Indictment of one count alleging a violation of *21 U.S.C. 841 (a) (1) and (b) (1) (A)*, possession with intent to distribute methamphetamine.

This case was disposed of pursuant to a conditional plea taken under **F.R.Crim.P. 11**, following a hearing on the Defendant's Motion to Suppress, which was overruled by the district court, following a Report and Recommendation by the hearing magistrate.

This case arose following a warrantless search conducted of the person of the Appellant following her interdiction at the Kansas City International Airport. The record reflected that the Petitioner disembarked from an incoming flight and was followed through the airport by a Kansas City Missouri Police officer and a U.S. Air Force airman assigned to drug interdiction. As Petitioner approached a gift shop she was confronted by the officer and the airman and requested the examination of her airline ticket. The officer then asked if he could search her and her luggage to which she replied in the affirmative. During this contact she was approximately 1-1/2 feet away from a wall with the officer and airman standing approximately 1-1/2 - 2 feet away from her. Mr. Favela has a limited command of English and the interdicting officers did not speak Spanish.

Following a fruitless search of her luggage, the Kansas City, Missouri police officer pantomimed that she should pull her shirt, which was loose and billowy, tight. This action revealed a bulge. When the officer asked to touch the bulge the Petitioner nodded her head, following which she was placed under arrest.

The touching of the bulge apparently occurred in response to a gesture made by the police officer to which the officer assumed she acquiesced by nodding her head.

No written consent was obtained and the interdiction officers, as a matter of policy, do not carry written consent forms.

The airman accompanying the officer testified that no oral response to the request that she pull her shirt tight was heard, but that the Petitioner complied with the officer's request.

Following a Motion to Suppress, a U.S. Magistrate issued his Report and Recommendation recommending denial of the Defendant's Motion. The Report and Recommendation was Affirmed by the District Court following an independent review.

Following her conditional plea, the Defendant was sentenced to a term of 70 months in the custody of the Bureau of Prisons, together with supervised release for five years, together with a $100.00 special assessment fine.

A timely Notice of Appeal was filed following this sentencing.

The conviction was affirmed by the U.S. Court of Appeals for the Eighth Circuit in a published opinion styled U.S. v. Favela, #00-2314, ___ F.3d ____ (8th Cir. 2001).

Jurisdiction in the Court of the first instance was invoked pursuant to *21 U.S.C. 841 (a)(1)* and *(b)(1)(A)*.

REASONS FOR GRANTING THE WRIT

The Petitioner believes that the Opinion of the United States Court of Appeals for the Eighth Circuit in this case directly conflicts with prior decisions by this Court in *Minnesota v. Dickerson, 508 U.S. 366 (1993)*, *U.S. v. Mendenhall, 446 U.S. 54 (1980)* and *Florida v. Royer, 460 U.S. 491 (1983)*.

Under the circumstances in the in the present case on two instances the detaining officer identified himself as a narcotics agent and directed questions at the Petitioner calculated to lead her to believe that he was of the opinion that she was transporting narcotics.

Following an inspection of her ticket and then her driver's license, the officers returned these items to her, but did not indicate she was free to depart. Rather, he pantomimed an action which he wished her to take (pulling her shirt tight) calculated to gain visual access to an area of her body which lay underneath a loose fitting garment.

Following the touching of the bulges so revealed, the Petitioner was placed under arrest.

The Petitioner believes that the totality of the circumstances in this case reflect an involuntary detention of the Petitioner from that point following which her driver's license and ticket were returned to her, arising from the close physical proximity of the officers to the Petitioner.

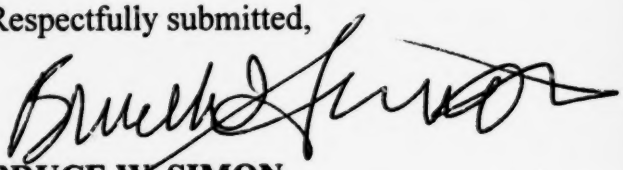
The Petitioner believes that the circumstances reflected by this case clearly show that the initial stopping by the police officer became a detention following the return of her ticket and the driver's license rather than standing aside, or by other means indicating that she was free to leave, the officer pantomimed that he wished her to pull her blouse tight revealing bulges which the officer then elicited permission to touch, following which the Petitioner was arrested.

The Petitioner believes that the totality of the circumstances presented in this case preclude a reasonable person believing that she was free to leave and consequently the initial encounter became an unlawful detention arising from a *de facto* submission to authority.

CONCLUSION

The Petitioner respectfully requests this Court to issue the Writ of Certiorari to review the opinion and judgment entered by the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-2314

United States of America,	*	
	*	
Plaintiff - Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Western District of Missouri.
Maria DeJesus Favela,	*	
	*	
Defendant - Appellant.	*	

Submitted: January 9, 2001

Filed: April 26, 2001

Before LOKEN, HEANEY, and BYE, Circuit Judges.

LOKEN, Circuit Judge.

After Maria DeJesus Favela pleaded guilty to possession of methamphetamine with intent to distribute in violation of 21 U.S.C. § 841(a)(1), the district court[1] sentenced her to seventy months in prison and five years of supervised release. Favela appeals the denial of her motion to suppress methamphetamine found on her person following her arrest at the Kansas City International Airport. The issue is whether the arrest followed a consensual search tainted by an unlawful detention. We affirm.

[1]The HONORABLE SCOTT O. WRIGHT, United States District Judge for the Western District of Missouri.

On the day in question, Favela arrived at the Kansas City airport on a plane from California. Task Force Officer James Morgan and Senior Airman Paul Callaway watched Favela for about ten minutes as she walked back and forth from Gate 34 to a restroom and gift shop near Gate 30, and then sat for a few minutes near the Gate 30 exit before again proceeding to the gift shop entrance. Officer Morgan approached from behind, identified himself as a police officer, displayed his badge and identification, and asked Favela if he could speak with her. She agreed. Morgan stood approximately 1½ feet in front of Favela, while Callaway stood approximately 2½ feet to Morgan's left. Both were dressed in plain clothes and did not display weapons.

Morgan asked Favela if she spoke English. She replied, "a little." Favela told Morgan she was in Kansas City for one day to visit family and allowed him to review her identification and one-way airline ticket (purchased with cash the day before). Morgan asked if she had illegal narcotics or a large sum of currency in her possession. Favela responded that she did not. Morgan then asked if he could search Favela and her bag. Favela consented and handed her clear plastic bag to Morgan. While Callaway searched the bag, finding no drugs or other contraband, Morgan asked Favela to pull her loose-fitting shirt tight around her stomach area, demonstrating the request by pulling his own shirt tight. When Favela complied, Morgan and Callaway observed a bulge in the upper middle portion of her stomach area. Morgan pointed to the bulge and inquired what it was. Favela sighed, shrugged her shoulders, and looked at the floor. Morgan asked if he could touch the bulge. Favela nodded affirmatively. After feeling two hard bulges he believed to be illegal drugs, Morgan placed Favela under arrest. A search incident to the arrest uncovered 1.2 kilograms of methamphetamine taped to Favela's body. The entire encounter lasted approximately five minutes.

In denying her motion to suppress following an evidentiary hearing, the district court found that Favela initially agreed to talk to Officer Morgan and Airman Callaway and then voluntarily consented to the search of her bag, a search of her person, and to pulling her shirt tight at Officer Morgan's request. These findings are not clearly

erroneous. See United States v. McKines, 933 F.2d 1412, 1423 (8th Cir. 1991) (en banc) (standard of review). They distinguish this case from United States v. Eustaquio, 198 F.3d 1068, 1070 (8th Cir. 1999) (unconsented touching of a bulge in the defendant's clothing, without reasonable suspicion, violated her Fourth Amendment rights), and United States v. Green, 52 F.3d 194, 197 (8th Cir. 1995) (because defendant did not consent to search of her bag, detention of the bag for a dog sniff was a seizure requiring reasonable suspicion).

Favela argues the district court should nonetheless have suppressed the methamphetamine because her initial encounter with Morgan and Callaway was a Fourth Amendment seizure, the officers had no reasonable suspicion justifying that investigative stop, and therefore the consensual search of Favela's person and her subsequent arrest were tainted fruits of a Fourth Amendment violation. The district court rejected this contention, concluding that the officers' conduct in approaching and questioning Favela did not constitute a seizure. The issue of seizure turns on whether, considering the totality of the circumstances, "a reasonable person would have believed that [s]he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554 (1980) (plurality). We review this issue *de novo*. McKines, 933 F.2d at 1426.

Not every encounter between law enforcement officers and an individual constitutes a seizure for purposes of the Fourth Amendment. For example, "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [and] by putting questions to him." Florida v. Royer, 460 U.S. 491, 497 (1983) (plurality). Here, Favela argues that, when the officers stood in close physical proximity to her near the gift shop entrance and identified themselves as police officers, they created a situation in which a reasonable person would not have felt free to leave. We disagree. Morgan and Callaway were both standing in front of Favela, dressed in plain clothes and not displaying weapons. She was not surrounded, and there is no evidence that the distance between them was unusually close or threatening

for conducting a conversation in a busy public airport. Officer Morgan properly identified himself and asked in a non-coercive manner if Favela was willing to talk. Favela was not physically touched or restrained, she was not told she must cooperate, and she was not asked or told to accompany the officers to a different location. We agree with the district court that a reasonable person would have believed she was free to end the consensual conversation and leave. See United States v. Gilbert, 936 F.2d 377, 378 (8th Cir. 1991) (per curiam); United States v. Dennis, 933 F.2d 671, 673 (8th Cir. 1991) (per curiam).

Favela argues at length on appeal that Officer Morgan lacked the reasonable suspicion necessary to justify a non-consensual investigative stop. We need not consider that question because there was no seizure for Fourth Amendment purposes. Favela agreed to talk to Officer Morgan in a public place. She consented to a search of her person that ultimately provided Officer Morgan with probable cause to arrest. The methamphetamine was then discovered in a lawful search incident to Favela's arrest. In these circumstances, her motion to suppress was properly denied.

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.